

STATE OF MICHIGAN
MICHIGAN SUPREME COURT

Bruce Behnke, Angela Behnke,

Plaintiffs/Appellees

v

Supreme Court #127459

COA: 248107

Lower Court Case Number: 01-5523 -NI

Estate of Karen McLean, deceased,

Defendant,

and Auto Owners Insurance Company,

Defendants/Appellants

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Plaintiffs/Appellees Supplemental Brief in Support of Answer to Defendants/Appellants'
Application for Leave to Appeal

FILED

AUG 17 2005

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

127459
Suppl (as per order)

I. THE COURT SHOULD PEREMPTORILY AFFIRM THE COURT OF APPEALS OR DENY THE APPLICATION FOR LEAVE TO APPEAL BECAUSE THE DECISION OF THE COURT OF APPEALS COMPORTED WITH THIS COURT'S DECISION IN *KREINER V FISCHER*.

At issue in the instant case is whether Plaintiff suffered a serious impairment of body function as specifically defined by the Michigan legislature in MCL 500.3135(2). In interpreting that statute, the Court of Appeals had the benefit of this Court's decision in *Kreiner v Fischer*, (after remand), 471 Mich 109; 683 NW2d 611 (2004), decided only months earlier. The Court of Appeals relied extensively on this Court's elaboration of the legislature's use of the term "general ability to lead one's normal life", and faithfully applied the standards set forth in *Kreiner* to the instant case. For that reason, the instant case represents an ideal case for peremptory treatment.


The principles this Court espoused in *Kreiner v Fischer* are identified and applied by the Court of Appeals in pages 12-16 of the Court of Appeal's opinion. The Court of Appeals applied the list of factors this Court identified *Kreiner* to aid in determining whether Plaintiff's "general ability" to conduct the course of his normal life had been affected by his injuries. The Court of Appeals' analysis of each factor supported the overall conclusion that Plaintiff's "general ability" had been affected. Thus, the Court determined that the nature and extent of the impairment to Mr. Behnke "effectively foreclosed [him] from doing many activities because they aggravated his injuries and caused intense pain." (Slip opinion, page 13) Regarding the type and length of treatment required, the Court of Appeals correctly noted that there was no

cure for Mr. Behnke's ailment and the only treatment available was chronic pain relief. (Id page 14). The duration of the injury was noted to be indefinite permitting Mr. Behnke to perform only light duty work. (Id) Addressing the issue of the extent of any residual impairment, the Court of Appeals noted that Mr. Behnke's career choices were limited by his injury and that the injury likewise had significant impact on a substantial number of activities outside the workplace. (Id) Finally, the Court of Appeals evaluated Mr. Behnke's prognosis for eventual recovery and relied on Mr. Behnke's physician's testimony at trial that Mr. Behnke's injury will be with him "probably the remainder of his natural life". (Id) Taking these factors as a whole, this Court determined that the statutory threshold set forth by the legislature and elaborated by this Court in *Kreiner* had been exceeded.

Thus, the decision of the Court of Appeals is entirely consistent with this Court's decision in *Kreiner v Fischer* and forthrightly applied the principles set forth in that decision. The primary issue raised in this case is exactly the issue addressed extensively in *Kreiner v Fischer* not even a year ago. There is no need for further judicial review by this Court. Therefore, the Court should deny the Application for Leave or enter a peremptory order affirming the Court of Appeals.

Respectfully submitted,

Dated: August 15, 2005



BY: Eugene Petruska
Attorney for Plaintiffs/Appellees

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